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## Governance in the earthquake area and the Energy Port Region Groningen

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## Conference of the ECPR Standing Group on Regulatory Governance

### **“Governance in the earthquake area and the Energy Port Region Groningen: Public-private partnerships as a panacea for a sustainable future?”**

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#### **Abstract**

Ever since the recognition of the causality between earthquakes in the Region Groningen, gas production and the ensuing damage to houses and buildings in that area, government faces big challenges in policy-making. On the one hand liability for damages must result in fast and effective repair of houses and buildings and in safety safeguards for the infrastructure. On the other hand public trust in governmental institutions in the Earthquake area Groningen has to be restored.

As a result of the advice of the Commission ‘Sustainable Future North East Groningen’ a comprehensive package of measures called ‘Trust in restoration, Restoration of trust’ (‘Vertrouwen op herstel, Herstel van vertrouwen’) was announced in which public-private partnerships were introduced for the purpose and in favor of the economic perspective of the region, including the establishment of local initiatives on sustainable energy, damage repair and guaranteeing a confidential approach by the government.

Multiple actors are involved in the execution of this package of measures, since the competence of decision-making lies at State, regional and local level. Together with the emergence of public-private partnerships this all results in a very complex case of multi-level governance and policy-making.

The central research question this paper addresses is whether public-private partnerships contribute in a legal and effective manner to policy-making following the package of measures ‘Trust in restoration, Restoration of trust’ in the Energy Port Region Groningen.

The central question in this paper is whether the chosen form of governance attributes to a sustainable future of the region. This is done by a critical analysis of the Economic Board Groningen, being a public-private partnership-initiative in the earthquake area Groningen and its additional value in achieving the objectives of the comprehensive package of measures, including the above mentioned economic perspective in the Energy Port Region Groningen and related local energy initiatives. Analytical notions of multi-level governance will be integrated in concepts and discourses found in the literature on modes of governance and policy-making related to public-private partnerships. We will demonstrate a gap between effectual approaches of governance and regulatory impediments as well as a description of policy-accumulation in this multi-level governance setting.

## 1. Introduction

On July 22<sup>nd</sup> 1959, the first Groningen gas was discovered by *the Nederlandse Aardolie Maatschappij* (NAM) in the subsoil of a field owned by a farmer called Boon near Kolham in the municipality of Slochteren. No one knew or could have believed the actual size of that gas field then. Only after a second drilling for gas in the same sandstone layer in the area of Delfzijl in 1960, NAM discovered gas with the same composition and pressure as in Slochteren. An enormous gas field of 2,7 billion cubic meters was found. Nowadays this gas field is known as the 'Groningen field'.

In 1971 in the Dutch Parliament, the former Minister of Economic Affairs Terlouw criticized NAM's secret research on ground movements. This research already took place in 1963, but was never published. The conclusion was that the winning of gas in the Groningen field would cause a subsidence of up to 1,5 meter.<sup>1</sup>

This subsidence causes earthquakes of the type 'induced quakes' that arise in (the vicinity of) a gas reservoir. The first induced earthquake found place in 1986, on December 24<sup>th</sup> nearby Assen in the Province of Drenthe. Ever since The Royal Netherlands Meteorological Institute recorded about 1,500 earthquakes directly caused by the gas extraction in the Groningen field. The assumption of a causal relationship, between the extraction on the one hand, and the ground movements with earthquakes as a result on the other hand, has been discussed for a long time, but nowadays the causality is recognized.

The natural gas in the Groningen gas field is located at the depth of approximately 3 kilometers. The earthquakes caused by the drilling and winning of gas, therefore happen at this small depth. As a result the earthquakes in the Groningen field are relatively heavily noticeable. Despite the reduction of the gas production in the Groningen field, 110 earthquakes occurred with a strength ranging from 0,1 to 3,1 on the Richter scale in 2015. So far, five earthquakes with a magnitude of 3,0 or more are caused by the gas extraction in the Groningen field. The most powerful earthquake with a force of 3,6 on the Richter scale took place on August 16<sup>th</sup> 2012, in Huizinge.

Since the assumption of a causal link between the winning of the gas in the Groningen field, the earthquakes and the resulting damages, government and private parties are (more or less) sentenced to working together. Perhaps this is not the most desired reason for starting a public-private partnership, yet it is one of the reasons to collaborate. It is a paradox though. While the earthquakes and the resulting damage is caused by a public-private partnership called the *Maatschap Groningen*, other public-private partnerships are supposed to offer a solution in that same area by implementing a package of measures called 'Trust on restoration, Restoration of trust'.

Does this lead us to the desired result and is the confidence of the citizens in the government institutions going to be recovered as envisaged in the administrative agreement 'Trust on restoration, Restoration of trust' in a right way?

This paper covers a case study in which the efficiency, legitimacy and transparency, being key criteria of 'good governance' will be discussed in relation to the Economic Board Groningen (EBG), as a type of public-private partnership.

## 2. Governance

Abundant research has been done on the changing role of government in society. Since the mid-nineties, government is no longer seen as a single autonomous entity, but as a multi-layered governance or better: multi-level government, in which central government and local governments

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<sup>1</sup> Report Onderzoeksraad voor de Veiligheid, *Aanhangsel Handelingen II*, 2015/16, nr. 58.

react to each other and different levels of government are involved.<sup>2</sup> Social issues are not only the responsibility of the government, but of social institutions, organizations, companies, and citizens as well. The increased complexity of societal issues and the need to economize collaboration with these and other parties is increasingly important.<sup>3</sup> It is argued that in the long term private parties will have increasing stakes in attending public tasks. Major decision-making in the area of labour market policy, health care, environmental and economic policies, will be undertaken in a regional context in which public and private parties are acting.<sup>4</sup>

### *Vertical and horizontal governance*

The awareness that cooperation and partnerships can lead to much more than the operation of one single party is not a novelty. The idea of shifting from vertical governance to more horizontal relationships between authorities and society emerges in the early seventies. Participation and co-determination are integrated into the administrative nowadays and relations are shifting from hierarchical to equivalent.<sup>5</sup> The call for democratization and the questioning of the position of 'ruling elites' results in a greater emphasis on consultation with stakeholders and citizen participation.<sup>6</sup> This shift has resulted in theories of citizens' participation, policy networks and (more recent) interactive governance.<sup>7</sup>

The question is what exactly is the difference between vertical and horizontal governance. Building upon on Max Weber, Michels and Meijer describe an ideal-typical model of vertical governance as a classical, central and hierarchical model for the relationship between governance and its environment. The main characteristic of vertical governance is that the government is seen as the only advocate of public interests.<sup>8</sup> Control of society fundamentally takes place through formal instruments such as law and legislation.<sup>9</sup> The organization of government is traditionally based on vertical governance. Within public organizations hierarchical relations apply. Politicians give orders to the administrators. Government act as a unified actor and places itself opposite the outside world. Initiatives for political action come from the formal governing bodies. In the vertical model accountability-issues are organized through formal relations between policy-makers and the representatives of the people.<sup>10</sup> One of the alleged advantages of the vertical model is the existence of clear-cut procedures for decision-making and the ability to act relatively quickly. Similarly, democratic elections give this model a broad base for legitimacy. A disadvantage of the vertical model is that the support for decisions and actions can be minimal because of the hierarchical model of decision-making and the relatively long four-year term, in which the public opinion might change. This risk of lack of support is an extra reason to develop more horizontal-based forms of governance.

Horizontal governance, in which a close cooperation between governments and private parties takes place, the emphasis is on the juxtaposition between the actors instead of hierarchical relations.<sup>11</sup> Hoekema and Van Manen advocate that the vertical model is one of 'one-sided governance' and the horizontal model one of 'double-sided governance'.<sup>12</sup> The model reflects 'negotiations' instead of 'orders' from above. Decision-making tend to develop into a complex process in which partisan interests are negotiated.<sup>13</sup>

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<sup>2</sup> Hooghe & Marks et al. 1993.

<sup>3</sup> Boogers 2014.

<sup>4</sup> Boogers 2015.

<sup>5</sup> De Swaan 1982; Stout & Hoekema 1994.

<sup>6</sup> Frissen 1996; Michels & Meijer 2003; Rouw & Schillemans 2005.

<sup>7</sup> Kickert et al. 1997; Koppenjan & Klijn 2004; Pröpper & Steenbeek 1999; Michels 2011; Torfing et al. 2012.

<sup>8</sup> Michels & Meijer 2003.

<sup>9</sup> Stout & Hoekema 1994.

<sup>10</sup> Schillemans 2007.

<sup>11</sup> Michels & Meijer 2003.

<sup>12</sup> Hoekema & Van Manen 1994, p. 149.

<sup>13</sup> Michels & Meijer 2003 p. 331.

The role of the government in this model has changed from a central steering actor to one of the parties involved. Control is assured through horizontal networks and process management.<sup>14</sup> In this governance model, policy-making can account for substantial support, provides added value to the vertical model of governance. At the same time the horizontal model's disadvantage is slowness of decision-making and selective legitimacy.<sup>15</sup>

Given the strengths and shortcomings of more vertical and more horizontal ways of policy-making, it is an obvious choice to combine them and to search for hybrid types of governance.<sup>16</sup> From research on interactive policy it is well known that the creation of incentives is crucial to build confidence and trust.<sup>17</sup> Research on public-private partnerships proves that it is necessary to pay attention to the recognition of the differences in thinking, interests and institutional rules.<sup>18</sup> However, there still is little empirical knowledge of the design of vertical-horizontal governance.<sup>19</sup>

The question is to what extent different types of public-private partnerships can be a toolkit for vertical-horizontal governance. Cooperation between public and private parties might not be trivial though, but 'good governance' is.

#### *Good governance*

In the international literature, the term 'good governance' is used to describe how public institutions conduct public affairs and manage public resources and in which governance is the process of policy- and decision-making as well as the process by which policy and decisions are implemented. The United Nations has defined 'good governance' as follows:<sup>20</sup>

*"Good governance is ensuring respect for human rights and the rule of law; strengthening democracy, promoting transparency and capacity in public administration."*

According to the United Nations 'good governance' covers 8 characteristics of which 4 of them are pointed as key elements for 'good governance' in a central and local government setting. These characteristics are:

1. democracy;
2. legitimacy;
3. efficiency and effectiveness;
4. integrity.

Although 'good governance' can be described as a model based on consensus, governmental institutions must always act in a legitimate way. On the other hand, governmental institutions are always willing to act as much as efficient and effective as possible. The question however, is whether public-private partnerships can contribute to 'good governance' and, if so, how these types of public-private partnerships can be implemented effectively. To answer this question, an analysis will be made of the value of public-private partnerships compared to (pure) government or (pure) market forces, the reasons for starting public-private partnerships as well as the existing conceptual frameworks of public-private partnerships.

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<sup>14</sup> Koppenjan & Klijn 2004; De Bruijn et al. 1998.

<sup>15</sup> Esselbrugge 2003; Koppenjan & Klijn 2004.

<sup>16</sup> Brandsen et al., 2005.

<sup>17</sup> Pröpper & Steenbeek 1999; Michels 2011.

<sup>18</sup> Koppenjan & Klijn 2004.

<sup>19</sup> Ponsioen, Van Staden & Meijer 2015.

<sup>20</sup> Weiss 2000.

### **3. The value of public-private partnerships**

Public-private partnerships can be instigated to improve efficiency and effectiveness and reduce the imbalance between policy objectives and behavioral patterns.<sup>21</sup> In the case they advocate for an effective national government, Osborne and Gaebler pledge for more cooperation between governments and the target groups of that specific policy.<sup>22</sup>

The idea behind public-private partnerships is that the added value of cooperation cannot be achieved by parties on their own. Different assumptions that underlie the idea of added value can be roughly reduced to the theory of 'New Public Management' and the theory of 'network governance'.<sup>23</sup>

New Public Management has made its entry in public administration in the beginning of the eighties of the last century and is based on the idea that the government needs to focus on the formulation of policies only. Implementation should mainly be left to, and handled by, others. This method would contribute to the increase of the efficiency and effectiveness of government intervention. The separation between policy and implementation may be realized by measures such as competition, market forces, outsourcing and privatization. In this way, different organizational units are entrusted with the implementation of policy measures. Governmental organizations have to monitor the execution via pre-determined performance indicators.<sup>24</sup> The ideas from the New Public Management are dominant in the scientific debate on efficient and effective structures of public-private partnerships. As reasoned, presumption is that the private sector can operate more efficiently and that by integrating different activities economical and innovational benefits can be achieved.<sup>25</sup>

Literature on governance and networks on the other hand, stresses the dependencies of actors in the realization of policy and the necessity of inter-organizational coordination in the realization of policy-outcomes and services.<sup>26</sup> Citizens and civil society organizations must be involved in the formation and development of policies. More horizontal coordination will lead to better products, more innovation and a faster and easier implementation of policies. Cooperation between public and private parties will lead to better products or policy on complex social problems. Sharing information can lead to innovative products and the combining of qualities. Combining the activities of public and private parties and the involvement of stakeholders in the policy-process can lead to more synergy, scale benefits, innovation and better products.

Both theories are interesting to cover good governance and policy-making in the earthquake area Groningen.

### **4. Reasons for starting public-private partnerships**

As a specific type of inter-organizational collaboration, public-private partnerships can be seen as intense and content-based networks where the involved parties provide input and receive output within a predetermined frame. The general outlines of the conceptual framework of public-private partnerships are the basis for a more detailed description of reasons for starting partnerships in a policy arena.

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<sup>21</sup> Hoogwerf & Herweijer 2008.

<sup>22</sup> Osborne & Gaebler 1993.

<sup>23</sup> Klijn & Van Twist 2007, p. 158.

<sup>24</sup> Osborne & Gaebler 1992; Kickert et al. 1997; Torfing et al. 2006.

<sup>25</sup> Klijn en Koppenjan 2004.

<sup>26</sup> Klijn en Koppenjan 2004.

Public-private partnerships are types of cooperation between the (local) government and one or more private companies.<sup>27</sup> Social goals as well as commercial goals are pursued and realized. In a public-private partnership parties from the public and private sectors are working together on an equal basis from planning to realization.<sup>28</sup> There is, amongst others, a proportional input of knowledge, skills and competences, manpower and money. The results of the cooperation, positive or negative, must be divided and spread equally over the participating parties.<sup>29</sup> It is key to divide risks, costs and benefits fairly.<sup>30</sup>

There are many different definitions of public-private partnerships, but all definitions of public-private partnerships share terms such as risk sharing, distribution of income, responsibilities and areas of expertise.

The added value of public-private partnerships in practice is reflected mainly by risk diversification and reduction for parties and actors, time saving, higher quality of the product and a more competitive product.<sup>31</sup> On the basis of the different theories about inter-organizational relationships Oliver describes six characteristics of, and motives for, the existence of a relationship between actors in a network.<sup>32</sup> In the earthquake area Groningen one or more of these characteristics may be recognized as a significant basis for the cooperation between the government and private parties.

#### *Need*

The need to collaborate can be born out of laws or rules of the government. Higher authorities may impose rules that lead to a cooperation that otherwise would not have existed.

#### *Asymmetry*

This motive for cooperation in a network stems from the need for power and control over another organization. The motive for the establishment of a network is dictated by the possibility of power and control over another organization and its resources.

#### *Reciprocity*

Reciprocity is a so-called win-win situation. The different parties enter into a relationship in their own advantage. It emphasizes that cooperation, coordination and collaboration in a network works better than domination, power and authority.

#### *Efficiency*

From this perspective, a network is formed to improve the internal input/output ratio. A network generates economies of scale because costs and risks can be divided and spread over multiple parties.

#### *Stability*

The stability of a inter-organizational relationships is connected to the predictability of the environment. The formation of a network is thus a response to uncertainty. Scarcity of resources and the incompleteness of knowledge of the area feed the uncertainty. Knowledge of the area and the (local) market is an advantage of the cooperation with other parties.

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<sup>27</sup> It seems reasonable to define 'company' the same way the ECJ defines 'undertaking', i.e.: every entity exercising commercial and economic activity.

<sup>28</sup> Canoy, Janssen & Vollaard 2001.

<sup>29</sup> Meis & Van der Voort 2005.

<sup>30</sup> Klijn & Teisman, 2000; Leus & Debievre, 2001; Koppenjan & Ham, 2002; Koldeweij, 2011 et al.

<sup>31</sup> Bult-Spieirng 2003.

<sup>32</sup> Oliver 1990.



### *Legitimacy*

Improving the right to existence can be a motive to enter into in a relationship with another organization. In this way, name, reputation, and performance might improve. An organization pulls himself up to the reputation of the other party. From this perspective, indisputable actors in high regard will be sought-after partners in a network. In this way, legitimacy can give parties access to new markets.

The main reason for starting a public-private partnership is that the cooperation for both the government and the business sector lead to relatively better output results than in case both parties separately are trying to achieve their own targets and goals. Collaboration gives the opportunity to use and exploit each other's strengths and can avoid or eliminate attentive weaknesses.<sup>33</sup>

According to Noordanus, the added value of public-private cooperation for (local) governments located is in the execution of a feasible plan with the allocation of risk and financial sense.<sup>34</sup> Market participants are willing to pre-invest in planning development as the investment provides them sales results. A condition for a successful public private partnership is that there is a common goal between the parties as well as interdependence (mutual dependence) at the start of the cooperation.<sup>35</sup>

## **5. Conceptual frameworks of public-private partnerships**

As stated before, public-private partnerships (also: PPP) can best be regarded as a positive form of cooperation of the government with private parties. Within the Netherlands, public-private partnerships are now a well-known term for all types of non-classical contracts given by the government to market parties, in particular contracts regarding area and regional development. These types of partnerships are formal cooperation concluded in writing. Other types of public-private partnerships can also be distinguished. These types are much more informal in nature and often, the government is entering the partnership with private parties on an ad hoc basis. The creation of a solid basis for policy- and decision-making as well as the increase of the transparency of government actions are prior to formalization of the cooperation. In the earthquake area Groningen both formal and more informal types of public private partnerships appear to be deployed.

In respect to the types of public-private partnerships a gross dichotomy can be made. On the one hand, one speaks of contract-PPS and on the other hand, one speaks of network-PPP.<sup>36</sup>

In a contract-PPP, design, construction, financing and management are integrated. The added value is reflected in the lower transaction costs between the elements, often appointed as value for money. Added value is, however, also generated by the creation of new solutions by the private party, usually the contractor who has submitted a tender. For example, the use of more sustainable materials. Contract-PPS is in the scientific debate being divided in DBFM contracts, and DBFO contracts, which stands for, respectively, Design-Build-Finance-Maintain and Design-Build-Finance-Operate. Also other derivative contract types such as Design & Conduct (D&C) or Design & Build (D&B) and Engineering & Conduct (E&C) can be found.<sup>37</sup>

In a network-PPP separate activities and projects will be integrated in order to generate added value. A public-private partnership is an organizational collaborative project in which different sub-projects will be brought together.

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<sup>33</sup> Kohnstamm et al. 1991.

<sup>34</sup> Noordanus 1995.

<sup>35</sup> Kouwenhoven 1991.

<sup>36</sup> Teisman 1998; Hodge & Greve 2005.

<sup>37</sup> Evendijk & Korsten 2009.

Network-PPP, for example, can be deployed to redevelop an area or region. The added value is created through synergy, which is achieved by the fact that different projects may be linked together. Thus interesting substantive results can be achieved.

The two above described types of public-private partnerships not only differ organizationally (more oriented on the contract and concession versus more focused on coordination and organization), but also in the way in which co-production between public and private organizations is achieved. Co-production in contract-PPP is mainly limited to the initial phases in which the tender takes place. Then, the emphasis is on monitoring. In a network-PPP co-production exists for a longer period of time.

For a clear understanding of the different types of public-private partnerships it is important to realize that also other names for the same phenomena occur. 'PPP' sometimes is replaced by 'packages'. 'Interacting PPP'<sup>38</sup>, 'alliance-PPP'<sup>39</sup> or 'institutional PPP'<sup>40</sup> are synonyms of 'network-PPP'. Contract-PPP is also referred to as 'concessional PPP'.<sup>41</sup>

More recently in the scientific debate on public-private partnerships, a trichotomy is made in which the organizing principles are decisive for the designation. In this debate Heldeweg and Sanders distinguish market-PPP, network-PPP and authority-PPP.<sup>42</sup> The classification of Heldeweg and Sanders can be schematically described as follows:

Characteristics / types	Market-PPP	Network-PPP	Authority-PPP
Goal of the cooperation	Efficient transactions	Elicit useful participation	Binding decision-making
Internal relationship between actors	Calculating in the context of a client - supplier relationship	Strategic alignment through participation	United by shared responsibilities and powers
Cooperation outcome	Set of contractually defined deliverables	Convergence of organizational behaviour	Series of decisions with public authority
Intended social effect	Contract-based control of behavior	Possibility of strategic alignment	Command-based control of behavior

Public-private partnerships require a certain degree of flexibility. In the earthquake area Groningen, this could be a bottleneck in the policy- and decision-making process while the themes and tracks of the comprehensive package of measures 'Trust in restoration, Restoration of trust', are heavily regulated. The energy market, but also the labour market and the financial market, are highly regulated markets in which principles of competition have top priority, in particular the regulatory framework of European competition law.

## 6. Legal basis for the responsibility of NAM

Before moving on to the EBG, as an example of public-private partnerships in the earthquake area Groningen, we give a brief outline of the regulatory framework of the mining activities for the benefit of the exploration of natural gas in Groningen and the consequences of ground movements in that area.<sup>43</sup>

<sup>38</sup> Everdijk & Korsten 2008.

<sup>39</sup> Van der Ham & Koppenjan 2002; Van den Hof 2006; Everdijk & Korsten 2009.

<sup>40</sup> Sanders 2014.

<sup>41</sup> Everdijk & Korsten 2009.

<sup>42</sup> Heldeweg & Sanders 2011.

<sup>43</sup> Gas in the Groningen field is won by the Maatschap Groningen, a public-private partnership between NAM and Energiebeheer Nederland B.V. (EBN).

When the Groningen field was discovered, time was too short to develop a specific regulatory framework. Therefore, the government declared the 'temporary' Mining Act of 1810 to be applicable. An additional argument for not developing new legislation was the assumption that the use of gas probably would be a temporary situation. Natural gas in that time had no real meaning for society. Coal was the main national source of energy and it was expected that nuclear energy would determine the Dutch and European energy supply and would replace other energy sources very soon.<sup>44</sup> This was the reason why the extracted natural gas was not only used in the Netherlands but also was going to be sold abroad. The 'Policy statement on the use of natural gas', or the 'De Pous statement' had two starting points. Firstly, the winning of gas should result in a maximum income for both the State and the producer. Secondly, the State should be involved in both the extraction as well as the marketing of natural gas.<sup>45</sup> The necessary terms and conditions were included in a concession.<sup>46</sup> This gave the State of the Netherlands an instrument to influence directly the extraction and winning of natural gas directly. At the same time the concession gave the Dutch government an important financial tool.

On July 1<sup>st</sup> 1961, NAM, who discovered the gas field in 1959, required the concession Groningen. On May 30<sup>th</sup> 1963, the concession of Groningen was granted to NAM. The concession contains two crucial conditions:<sup>47</sup>

1. the extraction of natural gas takes place with due observance of a partnership agreement between the concessionaire, its shareholders and a participant of State, approved by the Minister of Economic Affairs;<sup>48</sup>
2. extracted natural gas must be delivered by the concessionaire to the *N.V. Nederlandse Gasunie*.<sup>49</sup>

The so-called Gas building (in Dutch: Gasgebouw) was born.

As a result of the liberalization of the European energy market in 2005, the *N.V. Gasunie*, underwent a legal unbundling. The current company *Gasunie* is nowadays completely owned by the Dutch state and is responsible for all network activities. For this purpose, *Gas Transport Services B.V.* (GTS) is designated as the network manager of the gas transmission network. *GasTerra*, with the same market share as the 'old' *N.V. Gasunie*, took over all the business activities and has now exclusive access to the Groningen field.<sup>50</sup>

The first gas concessions contain the general provision that the concessionaire must avoid 'any distress or disadvantage' as much as possible to properties located in the field or the field's adjacent properties.<sup>51</sup> Only from the late sixties concessionaires are obliged to take measurements on a regular basis, prior to, during, and up to one year after the termination of the exploitation of the field. If the measurements show that extraction-related subsidence occurs, the Minister of Economic Affairs is authorized to take the necessary measures, including cessation of the extraction and exploitation of the gas.<sup>52</sup>

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<sup>44</sup> Roggenkamp 2015.

<sup>45</sup> Policy note of 17 juli 1962, *Kamerstukken II* 1961/62, 6767, nr. 1.

<sup>46</sup> Roggenkamp 2006.

<sup>47</sup> Article 11 of the Concession Groningen Field

<sup>48</sup> Formerly known as the Staatsmijnen in the Province of Limburg and recently known as Energiebeheer Nederland B.V.

<sup>49</sup> The *N.V. Nederlandse Gasunie* was founded at 6 April 1963. Shareholders are Shell (25%), ExxonMobil (25%), Staatsmijnen/Energiebeheer Nederland (40%) en de state of the Netherlands (10%).

<sup>50</sup> Roggenkamp 2015.

<sup>51</sup> See article 6 lid 1 sub a Concession on oil and gas Rijswijk, 3 januari 1955, nr. 69, *Stcrt.* 1955, 21.

<sup>52</sup> See article 21 of the Concession Donkerbroek, 20 maart 1995, nr. 69, *Stcrt.* 1995, 66.

Nowadays the Mining Act contains a number of additional instruments to avoid or limit damage as a result of investigation and winning. According to article 33 of the Mining act, concessionaires have the duty to take all measures that reasonably can be expected to prevent negative consequences for the environment, the safety, the systematic management of accumulations, as well as damage due to ground movements. Normal extraction, however, which sometimes goes hand in hand with unavoidable ground movements, cannot be stopped in accordance to article 33 of the Mining act. The question is what is to be understood by 'normal extraction'.<sup>53</sup>

Pursuant to article 46 of the Mining Act the Minister of Economic Affairs can stipulate that after termination of the gas exploitation, economic security must be given to cover any liability for damages caused by ground movements. The Minister of Economic Affairs ultimately determines the form in which and the amount for which economic security should be given.<sup>54</sup> As an additional security the 'Guarantee Fund Mijnbouwschade' was set up. If the concessionaire for some reason is no longer able to pay, aggrieved citizens are able to claim the damage caused by ground movements anyway. The Minister of Economic Affairs manages this Fund.<sup>55</sup>

Besides the responsibility of NAM based on the Mining Act, aggrieved citizens or injured parties can claim NAM's responsibility on the basis of article 6:162 of the Dutch Civil Code.

## **7. Legal basis for the responsibility of the government and NAM**

As stated above, in the present day it is no longer questioned that the winning of gas is the cause of nearly all the earthquakes in the northern part of the Netherlands.<sup>56</sup> Probably to avoid large legal claims and long legal procedures, the holder of the concession, NAM, the Dutch government and local governments decided to join forces.

### *Commission Meijer*

On May 23<sup>rd</sup> 2013, the Provincial Council of Groningen installed the Commission for Sustainable Future North-East Groningen (Commission Meijer). The work of the Commission can be seen as an addition to fifteen research studies instigated by the ministry of Economic Affairs as a reaction to the earthquake on August 16<sup>th</sup> 2012 in Huizinge. The Commission was given the following assignment:

*'Reason whether and to what extent a disadvantage exists in the area in which the effects of gas winning are tangible now, literally and figuratively. Answer the question how the loss of value for citizens, businesses, and communities can be restored. The responsibility for the damage directly caused by the earthquakes is not at stake; this can, and must, be handled through regular procedures. Neither is the commission asked to quantify indirect damage, loss or disadvantage to individual citizens or companies. At stake is the future perspective, the reputation of the area, the establishment and the quality of experience can be improved for the area in a sustainable way and what measures should be taken to achieve the desired effects. The measures must contribute the desired energy transition.'*

The Commission was not supposed to make statements about the future of the gas industry as such.<sup>57</sup>

The Commission carried out the research between May and October 2013. For the interpretation of program objectives and program tracks, external staff with specific expertise assisted the

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<sup>53</sup> Roggenkamp 2015, p. 1712.

<sup>54</sup> Roggenkamp & Verwer 2004.

<sup>55</sup> Article 135 Mining Act.

<sup>56</sup> The Royal Netherlands Meteorological Institute (in Dutch: Koninklijk Nederlands Meteorologisch Instituut)

<sup>57</sup> Commission Meijer 2013.

Commission. The work of the Commission was carried out in three phases. In the first phase the Commission explored why the area as such would have to be compensated for the negative consequences of the earthquakes in general. For further detailing, the Commission examined what the consequences were for the people in the area and what the adverse consequences were for the reputation, the attractiveness and the development potential of the area Groningen. Based on the results of the first phase, the Commission formulated the legal basis for a cooperation between NAM and the Dutch government for a contribution to, or settlement with, the affected people in the earthquake area Groningen. In the second phase the Commission carried out dozens of interviews with residents, entrepreneurs, interest groups and policy-makers. The goal was ambiguous. On the one hand, the interviews we expected to provide insight in the impact of the effects of (the risk of) earthquakes. On the other hand, insight was gained in opportunities, possibilities and new perspectives for the area. In addition to the interviews with the residents, entrepreneurs, interest groups and policy-makers, the executive board of the NAM was consulted. In the third phase, a number of experts tested the draft report of the Commission for accuracy and completeness. Finally, the draft report was tested on public support and feasibility.

The final report consists of two parts. In chapter 2 the question is answered whether and why the area can claim additional measures. In chapter 3 of the report a coherent program that the area, according to the Commission, needs to achieve a sustainable future is set out. The program consists of three program tracks:

1. safety and future perspective for individuals and entrepreneurs;
2. quality in living environment, and a sustainable economic;
3. regional perspective.

#### *Comprehensive package of measures 'Trust in restoration, Restoration of trust'*

In an administrative agreement of 2014, called the comprehensive package of measures 'Trust in restoration, Restoration of trust', the Dutch government, the Province of Groningen and the municipalities in the area, have, in cooperation with the NAM, reached an agreement for the outlines of a program of measures concerning the earthquake area Groningen. The program consists of four tracks:<sup>58</sup>

1. increasing the safety and preventive strengthening of houses and buildings;
2. improving the settlement of the compensation claims and additional value;
3. improving of the quality of life;
4. improving of the economic perspective.

#### *Other programs*

The number of (policy) programs that follow on the report of the Commission Meijer and the comprehensive package of measures are increasing and the content of these reports and programs are usually even larger. More important, the programs also contain their own (sub-)goals, and their own description of the instruments to achieve these goals. The program of EBG is one of them. The above shows the danger of 'policy-accumulation'. In the implementation of the comprehensive package of measures 'Trust in restoration, Restoration of trust' one can see different policies to be made on the same goals and targets. Plans, programs and actions follow each other in rapid succession. Key point is whether the government policy is not exceeding the social demand for policy in the area, which may lead to ineffective policy.<sup>59</sup> The question is whether this could be a real risk in the specific context of governance and policy-making in the earthquake area Groningen.

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<sup>58</sup> Comprehensive package of measures 'Trust in restoration, Restoration of trust' 2014, p. 1.

<sup>59</sup> Hoogerwerf & Herweijer 2008.

## 8. The Economic Board Groningen

Attributed by the comprehensive package of measures, EBG was given an important task in the improvement of the economic perspective of the North of the Province of Groningen. NAM and the Province of Groningen therefore funded an amount of in total € 97,5 million. EBG has the obligation to invest in the quality of human capital, the quality of entrepreneurship, a strong financing climate and the strengthening of powerful sectors and business clusters.

EBG's mission is: *"To contribute to the growth of sustainable employment, economic activity and the gross regional product in the earthquake area"*.<sup>60</sup> This will not be realized, as stated in the program, by ensuring growth via the Board itself, but by stimulating the development of plans by others.

The cooperation between NAM and the Province of Groningen in the public-private partnership called EBG is primarily based on 'need'. As stated before, the responsibility of NAM for damages caused by the drilling, gas winning and the resulting ground movements, can be based on the Mining Act. Furthermore, and in addition to this responsibility, the comprehensive package of measures 'Trust in restoration, Restoration of trust', claims that both the Dutch government and NAM can be held responsible. In track 4 of the package EBG is instigated. The question is whether this reason for collaboration is (legally) solid and does the public-private partnership actually work in practice?

EBG is most likely one of the best examples of an authority-PPP. Its characteristics highly suit the criteria of an authority-PPP as described above. EBG for example, is responsible for certain banking and investment services in the area and EBG independently decides whether a company is given a personal loan for investment or not. That EBG has written its own program and is able to develop program tracks on its own, leads us to another key point.

### *Policy-accumulation and track pollution causing in-transparency*

Notable is that the goals and instruments of EBG as listed in the program differ from them listed in the comprehensive package of measures 'Trust on restoration, Restoration of trust'. A schematic reconstruction and the analysis of both reports lead to more important insights. The different programs are not structured in a uniform way. In none of the programs a schematic presentation of goals, sub-goals, instruments and financial resources is present. Furthermore the conceptual framework and terms are often multi-interpretable. For example, what is exactly meant by 'strengthening of SMEs' or 'Innovation'. The financial tracks in the program are not specified to the resources they come from.

Moreover EBG claims to do more than they are obliged to do. For example, 'creating sustainable jobs' is a sub-goal of another trail in track 4 of the package and therefore not an assignment for EBG. Striking is that EBG independently decided to invest in broadband (5G) Internet in the near future. Obviously, EBG has a free hand and mandate to do so. In other words, there is policy-accumulation and track pollution causing in-transparency in the policy-making process and in-transparency in the implementation of the comprehensive package of measures 'Trust on restoration, Restoration of trust', the EBG program and others.

In that context, it is interesting to have a closer look at the legitimacy of EBG, knowing that this Board is a public-private partnership funded by, on the one hand, the NAM (€ 65 million) and on the other hand, the Province of Groningen (€ 32.5 million).

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<sup>60</sup> Economic Board Groningen, *Route voor het versterken van de economie in Noordoost Groningen, Programma Economic Board Groningen*, Winsum: december 2014, p.10.

### *Legitimacy of EBG*

In their presentation on the ‘program of the Economic Board Groningen’, the Executive Board of the Province of Groningen advocate that EBG should be seen as a type of co-creation, since there is a joint creation of the assignment or contract and the entity to do so.<sup>61</sup> This seems to be incorrect. Co-creation is a type of collaboration in which all participants can influence both, the process as well as the result. EBG, however, was founded as a result of the development of the fourth track in the comprehensive package of measures ‘Trust in restoration, Restoration of trust’. The results for EBG to obtain were entered in the content of that same agreement.<sup>62</sup> EBG therefore must be qualified as a public-private partnership, focusing on the realization of socially relevant projects, in which the government and one or more private parties are working together and investments are made. EBG is a, by the Province of Groningen and NAM funded, foundation which gives effect to the assignment given by the comprehensive package of measures ‘Trust in restoration, Restoration of trust’.<sup>63</sup>

On types of public-private partnerships, the rules of (European) competition and public procurement law are applicable in case the cooperation focuses on the exercise of public contracts.<sup>64</sup>

For the determination of the question if the assignment of the EBG is a public contract as referred to the rule of public procurement law, the three following criteria apply:

1. the contract has been given by a public authority, called contracting authorities;
2. the contract is a public contract, meaning that the contract is for pecuniary interest concluded in written between one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;
3. the estimated value of the contract equals or exceeds the relevant financial threshold.

Furthermore must be questioned whether an exception occurs to the obligation following the public procurement procedures in case of fulfilling the above mentioned criteria. These exceptions can be found in either an exclusive right given by the public authority, or a so called ‘in-house contract’.

Regarding the question whether the Province of Groningen is a contracting authority as referred above, the answer in short is: “Yes”. The Province of Groningen is a territorial body and territorial bodies are included in the definition of contracting authority.<sup>65</sup> With this knowledge it can be argued that the assignment or contract for which EBG is responsible, is given by a contracting authority. This especially since in the contract no distinction has been made between tasks funded by NAM or by the Province of Groningen. In other words, the obligation given in the contract is a combination of tasks not to assignable to a specific public body or company. Therefore the contract derived at least from one contracting authority.

Hence the second question is relevant, whether in the present case, the Board’s assignment is a public contract.

Having regard to the terms of reference from the administrative agreement ‘Trust on recovery, Recovery of trust’ and the further elaboration in the program of the EBG itself, it can be concluded that this involves a contract to provide banking services. This conclusion is confirmed by the way EBG

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<sup>61</sup> Provincial Executive of the province of Groningen 16 december 2014, nr. 75/2014, Voordracht van Gedeputeerde Staten aan Provinciale Staten van Groningen over het programma van de Economic Board in het kader van de aardbevingen en bijbehorend financieel arrangement.

<sup>62</sup> In track 4 of the comprehensive package of measures ‘Trust in restoration, Restoration of trust’ 2014, the Economic Board Groningen is being set as the executive agency.

<sup>63</sup> The Economic Board Groningen is registered as a foundation (Dutch: stichting) at the Chamber of Commerce (Dutch: de Kamer van Koophandel) with the number 62901125.

<sup>64</sup> Pijnacker Hordijk, Van der Bend & Van Nouhuys 2009.

<sup>65</sup> Article 1, paragraph 9 of the Directive (EC) 2004/18.

acts in practice. EBG gives (starting) entrepreneurs a loan at interest rates of up to seven percent and a maturity of up to five years.<sup>66</sup> The provision of loans falls under the definition of banking services within the meaning of Annex II of the Directive on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts.<sup>67</sup>

Since it not will be questioned that the estimated value of the contract exceeds the financial threshold of € 209,000, the contract lies under the rule of public procurement law. Only if an exception was present, the contract of which EBG is responsible, should not be a tender. This exception must be found, as stated above, in the fact that the Board has been given an exclusive right or in case the public contract can be defined as a in-house contract.

In short, none of the two exceptions does exist. Crucial is that EBG is under insufficient supervision and control of the government. EBG is a foundation in which the Province of Groningen has no control at all.<sup>68</sup>

Under the Teckal case it is ruled that in case activities are not fully carried out for the contracting authority, the surveillance by the contracting authority should be present to a large extent.<sup>69</sup>

In case of EBG is of interest how the Teckal criteria relate to the execution of the contract by the Board. First of all, a foundation such as EBG would normally have been monitored by a Board of Supervision that largely would consist of representatives of the contracting authority. Yet, the EBG has no Board of supervision, but a Board of commissioners without any representative of the contracting authority. According to their website EBG's Board of commissioners exists of five members, in which the chairman has a background in scientific research and its members are, respectively, a financial director of the NDC Mediagroep, a former mayor of Delfzijl, a retired regional investment manager at the NAM and a financial director of the Royal Huisman concern.

Also elsewhere in the organizational framework of EBG, representation of the contracting authority does not exist. It is striking that for other Economic Boards in the Netherlands a supervision by public bodies or authorities is present in all entities. The Economic Board Amsterdam Economic Board Region of Zwolle and the Economic Board Greenport Duin en Bollenstreek, for example, have a different legal structure in which, for example, mayors and aldermen, are member of a Board of Supervision of the respective Economic Board.

## **9. In conclusion**

The distinctive characteristic of policy-making in the earthquake area Groningen is that it is both multi-level as well as horizontal. This last characteristic is primarily caused by the legal framework in which the obligation to compensate the damage caused by the earthquakes is laid down. Following this framework, both NAM and the State of the Netherlands can be held accountable.

Knowing that horizontal-governance can be recognized in the earthquake area Groningen, specific types of public-private partnerships might contribute to good governance and policy-making in that region.

The danger of policy-accumulation and 'track-pollution' via multi-level governance in the earthquake area Groningen makes the foundation of a good public-private partnership a rather complex process,

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<sup>66</sup> Like the characteristics of a revolving fund.

<sup>67</sup> Directive (EC) 20014/14, Annex IIA under 6.

<sup>68</sup> See for a more detailed analysis: D. Schuldink, *De Economic Board Groningen functioneel benaderd: een kwestie van een alleenrecht, quasi-inbesteding of gewoon aanbesteden*, to be published in 2016.

<sup>69</sup> ECJ 18 november 1999, nr. C-107/98, ECLI:EU:C:1999:562 (*Teckal*), ruling 50.



in which citizens, private and public parties should know each other's interests and in which the criteria of 'good governance' must be respected.

A simple documental analysis concerning the foundation and the tasks of EBG leads us to the following conclusions:

1. documents such as the comprehensive package of measures and EBG's program have their own corporate design and layout;
2. program tracks within the program of EBG differ from the layout and design of the comprehensive package of measures 'Trust in restoration, Restoration of trust';
3. there is no specific definition for the scope of the earthquake area Groningen as the target area;
4. no performance indicators are given to EBG;
5. terms both in the comprehensive package of measures as well as in the program of EBG are multi-interpretable;
6. the financial tracks are unclear and
7. the causality between goals, targets and instruments are vague.

Since EBG has a free hand in making and implementing its own program, the danger of policy-accumulation and 'track pollution' is present. This is causing in-transparency, while transparency in the policy-making is needed. Transparency in the policy-making process gives insight in legislative procedures, the efficiency and effectiveness of policy frameworks, government supervision and democratic principles. These are the key elements of 'good governance' that might be crucial for the implementation of the comprehensive package of measures 'Trust in restoration, Restoration of trust'.

On the basis of the analysis of EBG's legitimacy, it can be concluded that there are no reasons to believe that one of the exceptions in the procurement law occurs. As argued, there was no provision of an exclusive right and there is too much lack of supervision by the contracting authorities. The contract of EBG, given by the Province of Groningen and NAM, in order to achieve an improved perspective in the region, seems to be lying under the rule of public procurement law. This could be different when a predominantly government supervision would actually take place. To a limited extent, the Memorandum on the foundation of EBG offers this capability. For the Province of Groningen it is possible to nominate and appoint one member of the Board of Supervisors.<sup>70</sup> This could be, for example, a member of the Provincial Council.

Another recommendation to consider would be the specification of the financial resources of EBG by origin and activity. In that case, certain tasks and activities may lead back directly to the financial support of NAM, in which case EBG might have more commercial room and leeway for manoeuvre. Moreover and in addition to the above said, EBG would be able to act more transparently.

Transparency might be the key factor in policy-making in the earthquake area Groningen. Only then a part of the trust and confidence of the citizens in the region can be restored in the long term.

It is like taking the long way home.<sup>71</sup>

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<sup>70</sup> Article 9, paragraph 4a of the Memorandum on the foundation of the Economic Board Groningen, 19 March 2015, AWB/MU51500488.

<sup>71</sup> Take the long way home is a song by Supertramp, *Breakfast in America*, A&M Records Inc. 1979.

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